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10 JAMES RICHARDSON

11 UNITED STATES DISTRICT COURT

12 DISTRICT OF NEVADA

13  
14 JAMES RICHARDSON,

15 Plaintiff,

16 vs.

17 GERALD ROSE, DOES 1 through 10,

18 Defendants.

19 Case No. 3:22-cv-00265-MMD-CSD

20 **OPPOSITION TO MOTION TO DISMISS**

21  
22  
23 Plaintiff, James Richardson, by and through his undersigned counsel of record,  
24 hereby respectfully files this Opposition to the Motion to Dismiss [Dkt. #5] (the “Motion”),  
25 and states that the Federal Tort Claims Act (“FTCA”) is not triggered here because the  
26 United States is not a party defendant. This is true because neither the Defendant Gerald  
27 W. Rose (the “Defendant”) nor the United States has comported with the mandated terms  
28 and conditions of the Federal Employees Liability Reform and Tort Compensation Act of

1998, commonly known as the Westfall Act, 28 U.S.C. § 2679 (the “Westfall Act”). This action is thus pending against the Defendant exclusively in his individual capacity and the FTCA is not applicable.

For the reasons stated more particularly below, the Motion should be denied.<sup>1</sup>

# **I. PROCEDURAL SUMMARY**

1. On or about May 31, 2022, Plaintiff, *pro se*, filed a Complaint for Defamation against Defendant (and Does 1 through 10), in the Second Judicial District Court of the State of Nevada in and for the County of Washoe (the “State Court”), Case No.: CV-22-00862, Dept. 6. *See Dkt. # 1-1, p. 2-24 (the “Complaint”).* The Complaint sets forth three (3) Counts, namely: Count I (Defamation Libel *Per Se*); Count II (Slander *Per Se*); and Count III (Intentional Infliction of Emotional Distress). *Id.*

2. According to the Complaint, both Plaintiff and Defendant are residents of Washoe County, Nevada. *Id.*, p. 3, ¶ 2.

3. Furthermore, Plaintiff alleges that at all times relevant to the action, both Plaintiff and Defendant were employees of the U.S. Department of Transportation, Federal Aviation Administration (“FAA”), serving as Aviation Safety Inspectors (“ASIs”).

4. In summary, Plaintiff avers that Defendant defamed or otherwise intended to injure him by, *inter alia*, falsely and maliciously stating during the investigation of a “Hotline” complaint that Plaintiff engaged in “criminal” and other misconduct during the performance of a flight safety ramp inspection. *Id.* ¶ 23, *passim*. Defendant was not present during the inspection in question, *Id.* ¶ 11, yet Defendant knowingly and repeatedly proffered “outrageous,” exaggerated personal statements “unrelated to the actual investigation” designed to destroy Plaintiff’s heretofore unblemished career with the FAA. *Id.* ¶¶ 15-17.

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<sup>1</sup> Contemporaneously herewith, Plaintiff is filing his Motion to Remand based upon this Court’s lack of subject matter and thus removal jurisdiction.

1           5.       Plaintiff alleges that Defendant's allegations against Plaintiff were made and  
2 published "with malice and without any absolute, qualified or conditional privilege." *Id.* ¶  
3 21.

4           6.       Plaintiff further alleges that Defendant's representations "were so  
5 outrageous ... that [Defendant's] statements fall outside of any protection the law might  
6 provide to someone who comes forward with such allegations regarding an inspection that  
7 he did not personally witness." *Id.* ¶ 22.

8           7.       On or about June 13, 2022, Defendant filed a Notice of Removal, pursuant to  
9 28 U.S.C. § 1442(a)(1), only (the "Notice"). [See *Dkt. # 1, pp. 1-2*]. In support of the Notice,  
10 Defendant states that the: (1) "'Complaint for Defamation' is directed against  
11 [Defendant], a federal Aviation Safety Inspector with the Federal Aviation Administration,  
12 in a civil action pending in..." the State Court; (2) "'Complaint for Defamation' is one that  
13 may be removed without bond to this Court pursuant to Section 1442(a)(1) for the reason  
14 that Plaintiff has filed a civil action in state court against an officer or an agency of the  
15 United States relating to an act under color of such office at the time of the alleged events.  
16 See 28 U.S.C. § 1442(a)(1) (a civil action commenced in state court that is against or  
17 directed to any officer of an agency of the United States relating to any act under color of  
18 such office may be removed to the District Court of the United States)."

19           8.       The Notice of Removal is defective because this Court lacks subject matter  
20 jurisdiction based on this record. See *Plaintiff's Motion to Remand, contemporaneously*  
21 *filed herewith*.

22           9.       Defendant also filed the Motion [Dkt.# 5]. Therein, Defendant avers  
23 (mistakenly) that Plaintiff's claims fail, *prima facie*, because Defendant, like the United  
24 States, is *ipso facto* entitled to sovereign immunity. *Id.*, p. 2. Not only does the Defendant  
25 fail to reference the Westfall Act in his Motion or otherwise, Defendant or the United  
26 States failed to tender any certification mandated thereby stating that the Defendant was  
27 "acting within the scope of his office or employment at the time of the incident out of  
28 which the claim arose." See 28 U.S.C. §2679(d)(1) (referred to herein as a "Westfall

Certification”).

10. The FTCA is not applicable; and, Defendant is not entitled to enjoy sovereign immunity on this record.

## **II. ARGUMENT**

### **A. The Motion to Dismiss Should be Denied**

#### **1. Standard of Review**

In reviewing a Rule 12(b)(1) motion to dismiss for lack of jurisdiction, this Court must take the allegations in the Complaint as “true.” *Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004); *see also Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 944-45 (9th Cir. 1999); *Orsay v. United States Dep’t of Justice*, 289 F.3d 1125, 1127 (9th Cir. 2002).

In *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004), the Ninth Circuit explained the difference between facial and factual attacks under Rule 12(b)(1), as follows:

In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction.

*Id.*

If the moving party converts “the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction.” *Id.* (quoting *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n. 2 (9th Cir. 2003), *cert. denied*, \_\_\_ U.S. \_\_\_, 124 S.Ct. 2067 (2004)).

In this case, the Defendant erroneously argues that the allegations in the Complaint are insufficient on their face to establish subject matter jurisdiction. [*Dkt.# 5, p. 2*]. Whether subject matter jurisdiction exists therefore does not depend on resolution of a

1 factual dispute, but rather on the allegations in Complaint. By law, however, Plaintiff's  
 2 allegations are to be taken as true, and this Court must draw all reasonable inferences in  
 3 his favor. *See* Fed.R.Civ.P. 12(b)(1); *Savage*, 343 F.3d at 1039 n. 1; *Saridakis v. United*  
 4 *Airlines*, 166 F.3d 1272, 1274 n. 1 (9th Cir. 1999). Notably, the Defendant attaches no  
 5 affidavits, declarations or other documentary evidence to his Motion.

6 In the case at bar, the Complaint was drafted by the Plaintiff, *pro se*. [Dkt.#1-1, pp.  
 7 3-24]. This Court should therefore construe the complaint liberally because it was drafted  
 8 by a *pro se* plaintiff. *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir. 1987).

9  
 10 **2. The United States is not a Party Defendant; the Westfall Act was not**  
 11 **Invoked by the United States' Election; therefore, Plaintiff's Claims are**  
 12 **not Barred by the FTCA or the Doctrine of Sovereign Immunity**

13 The Westfall Act, 28 U.S.C. § 2679, is an exception to the waiver of sovereign  
 14 immunity and gives federal employees absolute immunity from common law tort claims  
 15 that arise out of actions taken within the course of their official duties. *Osborn v. Haley*,  
 16 549 U.S. 225, 229 (2007). Congress enacted the Westfall Act in response to the Supreme  
 17 Court's decision in *Westfall v. Erwin*, 484 U.S. 292 (1988), which added a "discretionary  
 18 function" requirement as part of the criteria for granting a federal officer immunity. Under  
 19 the procedures in place pursuant to the Westfall Act, when a federal employee is named  
 20 in a tort suit, the Attorney General or his designee may certify that the employee was  
 21 acting within the scope of his employment when he committed the alleged tort. *Osborn*,  
 22 549 U.S. at 230. "The United States Attorney in the proper district . . . or any Director of  
 23 the Torts Branch, Civil Division, Department of Justice, is authorized to make the statutory  
 24 certification that the [f]ederal employee was acting within the scope of his office or  
 25 employment with the [f]ederal [g]overnment at the time of the incident out of which the  
 26 suit arose." 28 C.F.R. § 15.4; 28 U.S.C. § 2679(d) (referred to herein as a "Westfall  
 27 Certification"). Once this certification occurs, the United States will then be substituted as  
 28 the defendant and the action will be governed by the FTCA. *Osborn*, 549 U.S. at 230; *see*

1 *McMillan v. Lavigne*, No. CV-20-02397-PHX-JJT, at \*2-3 (D. Ariz. Sep. 9, 2021).<sup>2</sup>

2 In this case, accepting the allegations in the *pro se* Complaint and all reasonable  
3 inferences therefrom as true, the Motion must fail. Most significantly, the United States  
4 Attorney for the District of Nevada has elected to *not* issue any Westfall Certification  
5 respecting the Defendant, here. Consequently, the United States has not been substituted  
6 as the defendant. This case stands against Defendant Rose in his individual capacity, only,  
7 and the FTCA is not triggered, *ipso facto*, at this early stage of the proceedings.

8 Additionally, the United States Attorney is presumed to know federal law and such  
9 omission must be treated as intentional or purposeful. *Mazariegos-Diaz v. United States*,  
10 No. 2:17-CV-440 JCM (GWF), at \*6 (D. Nev. Dec. 15, 2017) (“It has been a long-standing  
11 principle of jurisprudence . . . that ignorance of the law is no excuse.” *Ruley v. Nelson* 106  
12 F.R.D. 514, 518 (D. Nev. 1985).”); *U.S. v. Alderman*, No. CR06-0117C, at \*7 (W.D. Wash.  
13 June 27, 2006) (“Generally, ignorance of the law is no excuse.” *Cheek v. United States*, 498  
14 U.S. 192, 199 (1991).”). Indeed, the sitting U.S. Attorney General Merrick Garland - as a  
15 Judge on the U.S. Court of Appeals for the District of Columbia Circuit in 2003 served on  
16 the panel in the matter of *Stokes v. Cross*, 327 F.3d 1210 (D.C. Cir. 2003), which thoroughly  
17 construed and adjudicated the Westfall Act. Arguably, then, the actual knowledge of the  
18 sitting U.S. Attorney General should be imputed to his subordinate U.S. Attorneys.  
19 Nevertheless, the Defendant is not entitled to any of the benefits or safeguards afforded  
20 by the Westfall Act because its terms and conditions have been disregarded. Therefore,  
21

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22 <sup>2</sup> Note, the Westfall Certification by the Attorney General as to whether the federal employee was  
23 acting within the scope of his employment is judicially reviewable (and not conclusive), for  
24 purposes of substitution. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 435 (1995); *Billings v.*  
25 *United States*, 57 F.3d 797, 800 (9th Cir. 1995); *Green v. Hall*, 8 F.3d 695, 698 (9th Cir. 1993). And,  
26 for purposes of challenging the Westfall Certification, limited discovery regarding matters  
27 surrounding the issuance of the Westfall Certification may be permitted by the District Court. See  
28 *Stokes v. Cross*, 327 F.3d 1210, 1216 (D.C. Cir. 2003) (“Accordingly, because the district court  
deviated from the *Kimbro* approach by essentially affording conclusive weight to the AUSA's  
scope-of-employment certifications and failing to consider whether [plaintiff's] allegations  
entitled him to discovery, we reverse. On remand, the district court shall allow Stokes to conduct  
at least limited discovery on the scope-of-employment issue.”).

1 sufficient facts have been alleged or a material factual dispute exists as to whether  
 2 Defendant was acting within the scope of his employment, *vel non*, at the time he engaged  
 3 in the intentional torts at issue.

4 Recognizing the simple fact that Defendant in his Motion is mute factually regarding  
 5 the “scope of his employment,” Plaintiff sets forth sufficient allegations supporting the  
 6 contention that Defendant acted outside of the scope of his employment. Plaintiff has  
 7 alleged that the Defendant’s statements were made and published “with malice and  
 8 without any absolute, qualified or conditional privilege.” *Id.* ¶ 21. Plaintiff has further  
 9 alleged that Defendant’s representations “were so outrageous ... that [Defendant’s]  
 10 statements fall outside of any protection the law might provide to someone who comes  
 11 forward with such allegations regarding an inspection that he did not personally witness.”  
 12 *Id.* ¶ 22. The Complaint not only alleges the absence of privilege or immunity, contextually  
 13 (*see Complaint, passim*) - this Court can reasonably infer that Defendant maliciously  
 14 intended to derail Plaintiff’s unblemished career with the FAA<sup>3</sup> and cause him [Plaintiff] to  
 15 be criminally punished pursuant to 18 U.S.C. § 1001 for making false statements related  
 16 to the FAA “ramp inspection” in question.<sup>4</sup> *See Complaint, ¶¶ 11, 16-23, 26-30.* Such  
 17 malicious misconduct is contrary to the best interest of the employer here, the FAA. *See,*  
 18 *e.g., Stokes v. Cross*, 327 F.3d 1210, 1216 (D.C. Cir. 2003) (“But Stokes’ counsel explained  
 19 that, if permitted to conduct discovery on the scope-of-employment issue, he would seek  
 20 depositions of the defendants and other witnesses as well as statements they had made  
 21 and memoranda they had written indicating their intent to prevent the best candidate,  
 22 namely Stokes, from getting the promotion. Such evidence, he maintained, would indicate  
 23

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24 <sup>3</sup> *See Complaint* ¶ 6.

25 <sup>4</sup> 18 U.S.C. § 1001 (“... in any matter within the jurisdiction of the executive, legislative, or judicial  
 26 branch of the Government of the United States, knowingly and willfully - (1) falsifies, conceals, or  
 27 covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious,  
 28 or fraudulent statement or representation; or (3) makes or uses any false writing or document  
 knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall  
 be fined under this title, imprisoned not more than 5 years....”).



1 that they had maliciously acted contrary to their employer's interest and, therefore,  
2 outside the scope of their employment.”).

3 **3. Defendant has Failed to Invoke the Protections Provided by the**  
4 **Westfall Act and the Same are Thereby Forever Waived**

5 It is axiomatic that the Defendant failed to comport with the Westfall Act. The  
6 United States failed to tender any Westfall Certification. The United States has failed to  
7 otherwise comport with the Westfall Act. The procedural protections potentially provided  
8 by the Westfall Act are, therefore, forever waived by, and not available to, the Defendant  
9 in this case. *See Clark v. Capital Credit Collection Serv*, 460 F.3d 1162, 1170-71 (9th Cir.  
10 2006) (“Under the generally accepted definition, a waiver is “the voluntary relinquishment  
11 . . . — express or implied — of a legal right or advantage.” *Black’s Law Dictionary* 1574 (7th  
12 ed. 2004); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Where waivers are permissible,  
13 they are often enforced only if the waiver was “knowing” or “intelligent,” which means the  
14 individual has “sufficient awareness of the relevant circumstances and likely  
15 consequences” of his decision, *Brady v. United States*, 397 U.S. 742, 748 (1970). *See*  
16 *generally United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990) (“A knowing  
17 and voluntary waiver of a statutory right is enforceable.”) (*Emphasis supplied*); *United*  
18 *States v. Michlin*, 34 F.3d 896, 898 (9th Cir. 1994) (“A knowing and voluntary waiver is a  
19 prerequisite to our enforcement of a plea agreement waiving appellate rights.”); *Leonard*  
20 *v. Clark*, 12 F.3d 885, 889-90 (9th Cir. 1993) (“First Amendment rights may be waived upon  
21 clear and convincing evidence that the waiver is knowing, voluntary and intelligent.”).

22 **III. CONCLUSION**

23 This Motion should be denied. For the reasons stated above, the FTCA is  
24 inapplicable here and its assertion is improper at this stage of the proceedings. Because  
25 the FTCA is inapposite, its administrative exhaustion requirements are inapplicable.  
26 Accordingly, the Motion to Dismiss should be denied.



1  
2 Dated: August 15, 2022

3 /s/Richard Carnell Baker

4 Richard Baker, Esq. (*Pro Hac Vice*)

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20 Local Counsel for Plaintiff

**CERTIFICATE OF SERVICE**

Pursuant to FRCP 5(b), I certify that I am an employee of Rusby Law, PLLC and that on this date, I filed the within document through the CM/ECF system with the United States District Court, who will send notice to the following:

HOLLY A. VANCE  
Assistant United States Attorney  
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Reno, NV 89501  
*Attorney for Defendant*

Dated: August 15, 2022.

/s/ Christopher Rusby